No. 00-1728

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICKY BROWN, *et al.*,

Petitioners,

v.

CITY OF ONEONTA, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF NEW YORK STATE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether law enforcement officials investigating a specific crime in which the victim gave a specific description of her assailant violated the Equal Protection Clause by seeking to question all individuals in a geographic area fitting that description.

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The State respondents respectfully submit this brief in opposition to plaintiffs' petition for a writ of certiorari.[1] The petition raises fact-bound issues and seeks review of a decision that relies on settled legal principles and which is not in conflict with any decision of this Court or with any decision of the circuit courts of appeal. The petition should be denied.

STATEMENT OF THE CASE

Oneonta is a small city in upstate New York located about seventy miles southwest of Albany. It has about 10,000 full-time residents who, for the most part, are white (A-7). Fewer than 300 of the 10,000 full-time residents are black (A-7). In addition to the full-time residents of the City, about 7,500 students attend and reside at the State University of New York College of Oneonta ("SUCO"), which sits on a hill within the City boundary (A-7). Just two percent, or roughly 150, of the SUCO students are black (A-7).[2]

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1. The State respondents consist of the State of New York, the State University of New York, College at Oneonta, the Division of State Police, individual state law enforcement officers, and individual employees of the New York State University College at Oneonta; the City respondents consist of the City of Oneonta and individual city law enforcement officers and employees; and the County defendants consist of individual Otsego County law enforcement officers and employees.

2. This demographic information is found in the decision of the Court of Appeals. SUCO records show that in 1992, about 5700 students were enrolled, of whom 2.3%, or approximately 131 students, were black.

On September 4, 1992, shortly before 2:00 a.m., someone broke into a private home located immediately outside the City of Oneonta and in close proximity to the SUCO campus (A-142). The assailant attacked a 77-year-old woman who was a guest in the home. Based on the description of the assailant given by the victim, which consisted largely of race and gender, the law enforcement respondents attempted to question all black male SUCO students and other persons in the Oneonta community (A-142-143).

As alleged in the second amended complaint, the victim told the State Police, and the City of Oneonta Police who assisted in the investigation, that she could not see her assailant's face, "but believed he was black because he had a dark hand or lower forearm"; that "she believed [he] was young because he ran quickly across the room"; and that both she and her assailant "were superficially cut with a knife the assailant brandished during the attack" and thus that the assailant may have a cut on his arm (A-162-163). A police canine unit tracked the assailant's scent from the scene of the crime toward the base of the SUCO campus, but lost the trail after several hundred yards (A-113).

The second amended complaint alleged further that law enforcement officers conducted their investigation as follows:

- They immediately contacted local hospitals and pharmacies to determine if a non-white male sought treatment for a cut (A-163).

- They obtained from SUCO a list of its black male students, and attempted to locate and question every student on that list, as well as black faculty and staff (A-163-164).

- They also attempted to interview black students at nearby Hartwick College and the Federal Job Corps Center in Oneonta (A-164).

- "Having failed to apprehend a suspect, * * * [defendants] beg[a]n a city-wide sweep" during which the "police made an effort to question and physically examine all non-white males in Oneonta" (A-165).

Plaintiffs, consisting of thirty-four black male SUCO students, two other black males, and one black female, allege under 42 U.S.C. § 1983 that the actions of the law enforcement defendants violated their rights under the Fourth Amendment and Equal Protection Clauses of the United States Constitution, 42 U.S.C. § 1981, and various other federal and state statutes. The district court denied plaintiffs' motion for class certification for "as many as 300" persons who were stopped and questioned by police during the investigation (A-154).[3]

Defendants made a series of motions requesting dismissal of certain claims on the pleadings or summary judgment. Plaintiffs cross-moved for summary judgment.

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3. Plaintiffs were granted class certification with respect to their claims under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, on behalf of all 78 students whose names appeared on the list provided by SUCO, but their FERPA claims were dismissed on qualified immunity grounds. *See Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997).

A. Decisions of the District Court

Ultimately the district court dismissed, with leave to replead, plaintiffs' Equal Protection claims because the complaint failed to allege that defendants treated plaintiffs differently from other similarly situated persons (A-124-128). It dismissed their claims under 42 U.S.C. § 1981 for the same reason. The district court granted defendants' motions dismissing all of plaintiffs' Fourth Amendment claims except for those alleged by Jennings, Quinones, and Plaskett, on the ground that the facts alleged in the complaint and plaintiffs' supporting affidavits did not as a matter of law rise to the level of a seizure under the Fourth Amendment (A-119-123).

The court granted summary judgment dismissing all surviving claims against the SUCO defendants and State Police defendants based on affidavits that they lacked personal involvement with any of the plaintiffs (A-121, 123). The district court also granted summary judgment dismissing all claims against City of Oneonta Police defendants Redmond and Olsen (A-123, 127). All other claims were either dismissed by the district court or by stipulation of the parties. Plaintiffs discontinued the Fourth Amendment claims of Jennings, Quinones, and Plaskett by stipulation, resulting in entry of a final judgment on September 9, 1998.

B. Decisions of the Second Circuit Court of Appeals

In its initial decision dated October 26, 1999, the Court of Appeals unanimously affirmed the dismissal of all claims under the Equal Protection Clause and 42 U.S.C. § 1981. The court, however, reversed and vacated summary judgment which the district court had granted dismissing the Fourth Amendment claims of Jean Cantave and Sheryl Champen.

On August 8, 2000, the Court of Appeals issued an amended decision adhering to its prior rulings. As it had in its initial decision, the court stated that a plaintiff can plead intentional discrimination under the Equal Protection Clause in one of three ways: First, a plaintiff can challenge a law or policy that expressly classifies persons on the basis of race, thereby invoking strict scrutiny; second, a plaintiff can allege that a facially neutral law or policy has been applied in an intentionally discriminatory manner; and third, a plaintiff can allege that a facially neutral law or policy has an adverse effect on racial minorities and was motivated by discriminatory animus (A-15).

The court noted that the plaintiffs in this case seek to plead an equal protection violation on the basis of a policy that expressly classifies persons on the basis of race (A-15). The court rejected the district court's view that it was necessary for plaintiffs to allege the existence of a similarly situated group that was treated differently in order to plead a cause of action based on this theory (A-15-16).

Nevertheless, the Court of Appeals affirmed the dismissal of plaintiffs' equal protection claims. Noting that this investigation was not based on racial stereotypes or profiles, but rather on a specific description given by the victim of the crime, the court found that, contrary to plaintiff's argument, the complaint simply did not allege a race-based classification (A-16-17):

> In short, plaintiffs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a

> crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault–a description that included race as one of several elements–defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.

The court continued in its analysis, holding that there is no allegation of discriminatory intent to support any claim that a facially neutral policy was applied with racially discriminatory intent (A-19). The court acknowledged that in a predominantly white community like Oneonta, police practices such as those alleged here might have a disparate impact on small minority groups, but noted that the Equal Protection Clause "has long been interpreted to extend to governmental action that has a disparate impact on a minority group only when that action is undertaken with discriminatory intent" (A-19). Given the absence of any factual allegation to support a finding of racial discriminatory intent, plaintiffs' claim could not proceed on that theory.

Finally, the court acknowledged the sense of frustration doubtlessly felt by those who were questioned during the investigation and the desirability of maintaining trust between the police and the community they serve, but pointed

out that the court's role was to determine only whether the investigation was conducted in violation of the Equal Protection Clause (A-19-20). The court held it was not. The court stated in a footnote, "to the extent that this opinion clarifies equal protection law, the district court is free on remand to entertain a motion to replead. We express no opinion on the merits of any such motion" (A-20).

Plaintiffs petitioned to the Court of Appeals for rehearing or rehearing *in banc* from the amended opinion. The petition was denied. Judge Calabresi dissented from the denial, in an opinion joined in part by Judges Straub, Sotomayer and Parker. He argued in dissent that plaintiffs stated an equal protection claim by alleging that police ignored the nonracial components of the physical description given to the police and questioned persons who, except for the racial description, did not fit the description (A-77-104). Thus, in his view, plaintiffs alleged that defendants effectively created a racial classification triggering strict scrutiny. Judge Straub, also dissenting from the denial of *in banc* review in an opinion joined by Judge Calabresi, would have held that strict scrutiny equal protection review is triggered whenever police rely on a physical description provided by a victim or witness that includes race (A-104-111).[4]

Chief Judge Walker, who authored both the initial and amended panel opinion, wrote a further opinion concurring in the denial of *in banc* review. Judge Walker rejected Judge Calabresi's "creative (and strained)" reading of the complaint, stating that the court properly "declined to reach out and embrace this new untested rule on facts that do not

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4. Judge Kearse also dissented from the denial without opinion and without joining either dissenting opinion.

put it at issue" (A-63). Calling the proposed rule "flawed and unworkable", Judge Walker noted that such a rule would severely hamper law enforcement efforts. He observed further that the Fourth Amendment adequately balances the needs of law enforcement against the rights of citizens to be protected (A-66-73). Judge Jacobs joined in Judge Walker's opinion but wrote separately to emphasize that Judge Calabresi's reading of the complaint "relies on an aggressive interpretation of passages juxtaposed from here to there, and conceives a claim that the plaintiffs themselves did not urge" (A-75). In his view, Judge Calabresi's proposed rule is not only unworkable but also "based on unexamined notions now current in the *bien pensent* community rather than on any previously understood principles of policing or * * * constitutional law" (A-76).

C. Further Proceedings in the District Court

After the issuance of the rehearing decision, on March 9, 2001, plaintiffs filed in the district court a motion to file a third amended complaint to try to allege facts to show that police ignored the victim's description of her assailant, other than race, and questioned and physically examined African Americans regardless of age and gender. In doing so they seek to plead Judge Calabresi's theory of the case that defendants effectively created an express racial classification which triggers strict scrutiny, or, in the alternative, facts showing discriminatory animus. On March 28, 2001, the district court granted plaintiffs' request for a stay of consideration of that motion pending proceedings in this Court.

REASONS FOR DENYING THE WRIT

I. The court of appeals decision is correct; there is no conflict with any decision of this Court or among the circuits.

The Court of Appeals correctly applied settled law to hold that there is no equal protection violation when law enforcement officials, who are given a limited description of a criminal suspect that consists primarily of race and gender, act on such a description by seeking to question all individuals fitting that description. In such a case, individuals are not questioned solely on the basis of race. They are questioned on the basis of a description given by the victim of a crime, a race-neutral policy used every day by every law enforcement agency in the country. When the police act on a description which originated not with the state but with the victim or a witness, they do not invoke a suspect classification that would be subject to strict scrutiny.

Other circuit courts of appeals have similarly held that where police have a description of a suspect that includes race, focusing on persons meeting that description for questioning is wholly legitimate. *See, e.g., Buffkins v. City of Omaha*, 922 F.2d 465, 468 (8th Cir. 1990) (concluding that officers' identification of defendant in part because of her race was "reasonable and nondiscriminatory in light of the fact that her race matched the racial description of the person described in the tip"), *cert. denied*, 502 U.S. 898 (1991); *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) (upholding investigatory stop based on race where defendants' race matched description of bank robbers, geographic and temporal proximity, and other observations), *cert. denied*, 459 U.S. 1211 (1983); *see also Dempsey v.*

Town of Brighton, 749 F. Supp. 1215, 1224 (W.D.N.Y. 1990) (rejecting plaintiff's argument that he was singled out for questioning on the basis of race, writing, "The police *knew* that the perpetrator was black. It would have been folly for them to look for anyone other than a person fitting the general description of the robber. If there had been no description of the robber as black, it might well have been impermissible to single out black men but that is certainly not what occurred in this case." [emphasis in original]), *aff'd without opn.*, 940 F.2d 648 (2d Cir.), *cert. denied*, 502 U.S. 925 (1991). Indeed, petitioners have pointed to no case in conflict with these decisions.

The point of these cases is that the racial trait of skin color is used in such situations not because of a prejudicial stereotype that a person of a particular race is more likely to commit a crime, but rather because the physical trait or traits associated with a particular race are manifestly germane to the victim's specific identification of the person who committed the crime. Because of the unique relevance to law enforcement activity of physical characteristics including the color of one's skin, law enforcement officials' use of skin color in pursuing investigations of crimes where the suspect's description includes skin color or other physical racial traits is a facially neutral criterion for deciding whom to question or target for further investigation.

II. The question proffered by plaintiffs is not fairly presented by the pleadings in this case.

Plaintiffs seek to present to this Court the question whether the Equal Protection Clause is implicated where law enforcement officials, in response to a report that a young black male committed a crime, targeted for questioning and physical examination the entire minority community of a

municipality based solely on race and to the exclusion of all nonracial identifying information. This question, however, is not before the Court in this case. As Judge Walker explained in his concurring opinion denying rehearing *in banc*, the scenario described in plaintiffs' proposed question presented is simply not alleged in the complaint. Notwithstanding certain conclusory allegations, the specific factual assertions contained in the complaint show that while defendants relied heavily on the racial component of the victim's description, they did not ignore other aspects of that description.

It is not disputed that the victim described her assailant as a black male whom she believed to be young because he ran quickly across the room; that she believed he received a cut on his arm during the struggle; and that the attack occurred just outside the City of Oneonta near the SUCO campus (A-142, 162). In addition, the district court found based on facts submitted on summary judgment motion that a canine unit tracked the scent of the attacker from the scene of the crime to a wooded area at the base of the SUCO campus (A-113).

The complaint's allegations themselves assert that the police relied on other identifying information, including gender, age, geographic proximity, and the possibility of a cut on the hand. Law enforcement officials were directed to "contact hospitals and pharmacies to determine if a non-white male sought treatment for a cut" (A-163). Law enforcement officials contacted SUCO and obtained "a computer generated list identifying the names and addresses of all *male* African-American students at SUCO" (A-164 (emphasis added)). Law enforcement officials then sought out and questioned all students, i.e., *male* students, on the list, as well as African-American faculty and staff (A-164). Finally,

the complaint alleges that, "[h]aving failed to apprehend a suspect, defendant Chandler, upon information and belief, directed the law enforcement officials to begin a city-wide 'sweep' . . . [during which] police made an effort to question and physically examine all non-white *males* in Oneonta" (A-165 (emphasis added)).

Thus, according to the complaint itself, defendants clearly did not disregard gender. The list obtained from SUCO contained the names only of African-American male students, and police sought out only those male students for questioning. Thirty-six of the thirty-seven named plaintiffs are male. Even the single allegation that police stopped Sheryl Champen, a woman, at the bus station does not support plaintiffs' broad claim that the police deliberately disregarded the nonracial aspect of the victim's description. Judge Walker properly noted that although it is possible that the police disregarded gender in this single instance, it is at least equally possible that the police, who did not ask to see her hands, were initially mistaken about her gender or were merely seeking relevant information from persons who were leaving town.

Nor did the police disregard geographic information. They focused, at least initially, on the SUCO campus. All but three of the thirty-seven plaintiffs were SUCO students. Most, although not all, were interviewed on or near the campus. According to the complaint, the police expanded the search only after their previous efforts were unsuccessful.

Finally, there are no factual allegations to support an argument that defendants ignored the elderly victim's belief that her attacker was relatively young because he could move quickly. Defendants' focus was clearly on college students who are more likely to be young then elderly. Indeed, not one of the named plaintiffs alleges that he is elderly.

While the complaint contains the hearsay allegations that defendant Chandler told the local newspapers that the police were trying "to examine the hands of all the black people in the community" (A-165); the conclusory allegations that defendants attempted to stop and question "every non-white person in and around the City of Oneonta" (A-143, 165); and several conclusory allegations that plaintiffs were approached and questioned "solely on the basis of their race" (*e.g.*, A-189, 191, 195), the specific facts alleged, and recited above, directly contradict plaintiffs' general assertion that all black persons were sought out and questioned and that all other identifying information was deliberately ignored.

Except for one plaintiff, the complaint nowhere alleges a specific incident where the police actually departed from the entire description given by the victim. Certainly, there are no specific factual allegations to support their argument that police "systematically strayed from the bounds of the description they were given and stopped 'any and every' African-American in Oneonta" (A-65).

Even if the question proposed by petitioners and Judge Calabresi did fit the factual scenario alleged in the complaint, certiorari would not be warranted. Judges Walker and Jacobs in their concurring opinions denying *in banc* consideration powerfully explained why even under that scenario the police should not be held to have created a racial classification subject to strict scrutiny. Such a rule would impose "paralyzing inhibitions" on law enforcement officials whose actions might trigger liability every time they ask questions of a person who is the same race as the described suspect, even when the officers cannot know whether the person they question satisfies the other identified characteristics or whether the person will eventually turn out to be a suspect.

Given the potential for inaccuracy or confusion in the witness's description, and the possibility for alteration of physical appearance, it is commonplace for police to question individuals who do not fit the description perfectly. It would simply be unworkable if law enforcement officers were subject to liability merely because they questioned someone who fit such a description in terms of race but not in every other respect.

Finally, as Judge Walker also properly observed, the Fourth Amendment prohibition against unreasonable searches and seizures, "carefully calibrated by the Supreme Court over two centuries," adequately balances law enforcement needs against the rights of citizens to be protected (A-67). *See, e.g., Choi v. Gaston*, 220 F.3d 1010, 1012 (9th Cir. 2000) (holding that evidence was sufficient to give rise to a jury question as to whether police had reasonable suspicion to justify stop under the Fourth Amendment or instead acted with racial bias). Where there are legitimate allegations of selective enforcement, the Equal Protection Clause may similarly come into play. *See Whren v. United States*, 517 U.S. 806, 813 (1996). But such is not the case alleged here.

III. This case does not present an opportunity for the Court to address the constitutionality of racial profiling.

This is a case in which law enforcement officials conducted an investigation of a specific crime using a limited physical description of the suspect provided by the victim of that crime which included race. This is not a case where the police used a presumption of criminality based on race, a stereotype, or a racial profile to approach or stop individuals

for questioning where police had no physical description from the victim of the crime. Regardless of whether the police applied race as one of several aspects of the victim's description for determining whom to question (as the panel construed the complaint), or ignored all other non-racial aspects of the description (as Judge Calebresi construed the complaint), this case is simply not a case involving racial profiling.

The panel's opinion was clear on this distinction: Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black (A-16). Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotype that all black Oneonta residents be questioned whenever a violent crime is reported.

Rather, defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand.

This distinction has also been recognized recently by the Sixth Circuit in response to arguments by a criminal defendant that he was targeted for questioning based on his race. *See United States v. Waldon*, 206 F.3d 597, 604 (6th Cir.) (rejecting defendant's argument that he was the object of illegal "racial targeting" or "racial profiling"; "[c]ommon sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if

descriptions of the perpetrator known to the officer includes race"), *cert. denied*, 531 U.S. 881 (2000); *cf. Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (equal protection claim was stated where plaintiffs alleged that police used racial profiling to target African Americans and Latinos in conducting stops, detentions, interrogations and searches of motorists as part of their drug interdiction efforts); *United States v. New Jersey*, Cir. No. 90-5970 (MLC) (N.J. Dec 30, 1999) (Consent Decree prohibiting racial profiling by New Jersey state troopers in traffic enforcement but expressly permitting them to rely on race or ethnicity where a specific suspect has been described in part by race or ethnicity).

IV. Plaintiffs have now sought permission to file a third amended complaint rendering the issue unripe for review by this Court.

Under the panel's decision below, plaintiffs were entitled to seek permission to file a third amended complaint to try again to allege an equal protection claim in light of its clarifying opinion. Plaintiffs in fact filed such an application on March 9, 2001, although consideration of that application is stayed at petitioners' request pending the proceedings in this Court.

Ordinarily, this Court does not issue a writ to reverse nonfinal orders. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)) ("except in extraordinary case, the writ is not used until final decree"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari where the court of appeals had remanded the case for further proceedings); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993)

(Scalia, J., concurring) (observing that the issue raised was worthy of review but opining that it was prudent to follow ordinary course and grant certiorari only if requested after final decree); *see generally* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice (7th ed.) § 418, at 196. There is no reason to depart from this general practice in this case. Because plaintiffs are seeking to replead their equal protection cause of action, any grant of certiorari is premature.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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